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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1929

No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari
REPLY BRIEF FOR PETITIONER

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On page 2 of respondent's brief it is asserted that the only warning decedent had to rely on with respect to the time the engine would be moved, was the time marked on the blackboard, which was 3 A. M. This statement is repeated in substance on pages 3 and 5. But it is clearly proved that the time posted on the blackboard was not the time for backing the engine from the engine stall, but was the time the engine was to be taken from the vicinity of the water plug by the road engine crew (R., pp. 22-23, fol. 25; pp. 42-43, fol. 46; pp. 80-81, fol. 87).

On page 4 of respondent's brief it is stated that blood stains were on the right-hand side of the rail of track No. 8, *adjacent to the track on which decedent was working.* This language is ambiguous, and might be construed to mean that the blood stains were on the right side of the rail next to track No. 7. The fact is that the body of decedent was found lying partly on the right-hand rail of track No. 8 adjacent to track No. 9, and partly outside of that rail, and the blood stains were on and near that rail as were the marks indicating that something had been dragged along that rail (R., p. 30, fol. 34; p. 32, fol. 35; p. 60, fol. 65; p. 76, fol. 82; p. 77, fols. 83-84; p. 92, fol. 99).

On page 4 of respondent's brief it is stated that the clearance between tanks standing on track No 7 and track No. 8 was about two feet. This is a mere estimate by McGee, the hostler (R., p. 83, fol. 90). He had never measured the clearance (R., p. 88, fol. 95). The clearance, as shown by the measurement of Gordon, the engineer, was about 3 feet 9½ inches (R., p. 104, fol. 113).

The clearance between tracks is an engineering problem which is not to be left to the uncertain opinions of juries.

Baltimore and Ohio R. Co. v. *Groeger,* 266 U. S. 521;
Toledo, St. Louis & Western R. Co. v. *Allen,* 276 U. S. 165.

On page 11 of respondent's brief it is admitted that no one saw what decedent was doing when he was injured, and this, it is argued, made it a question for the jury to determine what he was doing at that time.

There is no evidence in the case, either direct or circumstantial, to enable the jury to determine what decedent was then doing. All the circumstances indicate that he was doing nothing in connection with his employment. Four hours before the accident he had finished his work on engine 3709 which struck him. He had completed his work on engine 3835 and had placed his tools and supplies on the inspection wagon. There was nothing in connection with his employment which required him to go to the right-hand side of track 8 where he was struck, a distance of over 80 feet from the inspection wagon, where he was to remain until the foreman returned from "the farm."

On page 10 of respondent's brief it is stated that it was admitted that engine No. 3835 was an engine engaged in interstate commerce referring to record, top of page 96. At the top of that page the record states that Mr. Simpson said:

> "It is admitted, your Honor, that this engine 3835 pulls a train into New York State."

From this statement it is not proper to draw an inference that engine 3835 was assigned to, or was presently to begin an interstate trip. That this engine may have made an interstate trip before being placed in the roundhouse and that when next put in service, it went on an interstate trip, is insufficient to establish that it was engaged in interstate transportation at the time decedent was working on it.

In *Illonardo* v. *Erie R. R. Co.*, 135 Atl. 77 (cited on page 10 of respondent's brief), plaintiff was injured at a roundhouse used by defendant in interstate and intrastate commerce. A crippled engine was brought to the roundhouse

for repairs and plaintiff was called upon to assist in opening one of the doors to admit the engine. While thus employed and before the door was entirely open, the engine was started up without warning, crashed into the door, and injured plaintiff. It was held that plaintiff was engaged in interstate commerce.

It is at least open to question whether this Court would have sustained that judgment if it had been brought here for review.

In *Manziano* v. *P. S. Gas Co.*, 92 N. J. L. 322 (cited on page 14 of respondent's brief), plaintiff was found dead in a trench which he had been employed to guard, and had been guarding during the night. The trenches had been dug by defendant in an effort to locate leaks in a gas main. The odor of gas could be detected half a block distant. The volume of escaping gas made standing upon the embankment of the trenches dangerous to employees. Workmen could not work in the trenches for more than four or five minutes and they worked in relays. Maintenance of life in the trenches was impossible for more than six minutes. Decedent was instructed to guard the trenches and to keep four guard lights burning upon the embankments.

Decedent was last seen near the trenches at a little after 4 A. M., and was not seen again until his body was found in the trench about 6 A. M. One of the planks forming the barricade around the trenches was down, and one of the lamps broken and extinguished on its side on the embankment. The cause of this disorder was not shown by the evidence.

The Court held that these circumstances were sufficient to warrant a finding that the cause of death was an accident which arose out of and in the course of decedent's employment.

On page 15 of respondent's brief are cited the cases of *DeFazio* v. *Goldschmidt Co.*, 87 N. J. L. 317; *Bryant* v. *Fissell*, 84 N. J. L. 72; *Musik* v. *Erie R. R. Co.*, 85 N. J. L. 129.

These are all compensation cases under the State Statute.

In *DeFazio* v. *Goldschmidt Co.*, decedent was found dead lying near a train of cars with a hole about 6 inches in diameter in his abdomen. The proof was that he had gone to his foreman in search of material and while on this trip was injured. The Court held the evidence was sufficient to establish the fact that his injuries were received from an accident arising out of and in the course of his employment.

In *Bryant* v. *Fissell*, decedent, while engaged as a carpenter, was injured by a heavy bar falling from an upper story of a building in course of construction. This also was held to be an accident arising out of and in the course of decedent's employment.

In *Muzik* v. *Erie R. R. Co.*, decedent had delivered waybills to a train agent, and after the train had passed on, he was found dead within three or four feet from the track with an injury to his head. These facts were held sufficient to warrant a finding that he had been struck by the train in the course of his employment.

These cases do not support the contention of respondent that the evidence in this case was sufficient to warrant a finding that at the time of the accident decedent was engaged in interstate commerce, or was acting within the course of his employment.

We respectfully submit that the judgment should be reversed.

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